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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JANETTA SCONIERS, Defendant and Appellant.	F061411 (Super. Ct. No. F08905892) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Thomas M. Singman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Janetta Sconiers stands convicted, following a jury trial, of grand theft of personal property (Pen. Code,[1] § 487, subd. (a); count 1) and presentation of a fraudulent claim (§ 72; count 3).[2] Her motion for new trial was denied, and she was sentenced to 16 months in prison. Execution of sentence was stayed and she was placed on five years' probation on condition, inter alia, that she serve 180 days in jail and pay restitution in the sum of $11,692.29. In her timely appeal, she raises claims of prosecutorial misconduct and ineffective assistance of counsel. For the reasons that follow, we will affirm.

FACTS

I

PROSECUTION EVIDENCE

In-Home Supportive Services (IHSS) is a Fresno County Department of Social Services program that offers services aimed at allowing individuals with disabilities to remain safely in their homes. A social worker performs an in-home assessment of the applicant to determine whether the individual is eligible for the program. If so, the social worker authorizes a specific number of hours per month of services for the in-home care of the client. Eligibility requirements include that the disability must have lasted for at least 12 months, the applicant must be at risk for out-of-home placement, and the applicant must qualify for Medi-Cal benefits. The social worker bases his or her decision concerning eligibility and the services provided on the in-home assessment conducted face-to-face with the applicant, including the social worker's observations and what the

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1 All statutory references are to the Penal Code.

2 Count 2 of the indictment, which charged appellant with petty theft with a prior conviction (§ 666), was dismissed on motion of the prosecutor.

Appellant's codefendants, Tiyeondrea McGlothin and Lynniecesha Scott, each entered a conditional plea on the second day of trial to misdemeanor grand theft.

applicant says; a medical report the applicant is asked to provide as a supportive document to verify medical problems and disabilities; any documentation from someone such as a psychologist or therapist; and information obtained from family or friends who are in the home giving assistance.

Appellant was authorized to receive IHSS effective April 6, 2004. Tiyeondrea McGlothin and Lynniecesha Scott (appellant's daughters and care providers), and sometimes appellant herself, received payments from the State of California for hours claimed through August 31, 2005.[3]

At the time appellant first applied for IHSS, her stated health problems were grand mal seizures, high blood pressure, carpal tunnel syndrome, tendinitis on the backs of her hands, swelling of the hands, and herniated disk, all of which left her unable to do chores and personal care without assistance.[4] Jesse Rojas, the social worker who performed the initial assessment of appellant in May 2004, observed her to be walking normally. Appellant stated she did not require a wheelchair or other device to help her walk. Rojas also saw her use her hands. He authorized 84.2 IHSS hours per month.

Appellant disputed the number of hours as inadequate. In the resulting fair hearing, conducted telephonically on August 17, 2004, Katherine Tate, appellant's authorized representative, stated under oath that appellant told Rojas she did not have the ability to pull her underwear up or down, needed someone to change the diapers she wore due to incontinence, and did not have the ability to lift eating utensils because her fingers

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3 According to Greg Sanchez, Fresno County social worker supervisor, IHSS care providers often are family members. If, as a result of an appeal (known as a "fair hearing") a recipient is awarded additional hours retroactively, it is presumed that, during the time the recipient was not receiving authorized services, the recipient paid for the services out of his or her own pocket. In such instances, payment is made to the recipient.

4 Some of this information was obtained from a written doctor's statement, and some was reported by appellant.

became numb and tingly due to carpal tunnel. Tate represented that she had seen appellant's caregivers have to use the Heimlich maneuver to dislodge food from appellant's throat while appellant was having a seizure. Tate also represented that appellant's doctor said appellant needed protective services because of the unpredictability of those seizures. Under Tate's questioning, McGlothin stated under oath that due to one of appellant's medications, appellant suffered from diarrhea six to ten times a day, and so frequently had to be rebathed and her clothes rechanged.

Rojas subsequently submitted a referral for suspected fraud due to overstatement of needs. He did so because, at the hearing, Tate requested services far beyond what were authorized, including new categories of services that were significantly more than Rojas's assessment indicated appellant needed.

In compliance with the fair hearing decision, appellant was reassessed by Social Worker Minaxi Jhaveri in early November 2004. Appellant's stated health problems at that time were painful neck and back, painful hands because of carpal tunnel, frequent seizures, dizziness, and difficulty ambulating. Appellant, whose hands were in braces, told Jhaveri she did not have much use of her hands because of carpal tunnel. At one point, however, Jhaveri saw appellant pick up and use the telephone.

Although Jhaveri increased appellant's IHSS hours to 151.1 per month, retroactive to April 6, 2004, appellant again appealed the amount as inadequate. This resulted in a second fair hearing, which was held on December 22, 2004. At this hearing, which again was conducted telephonically, Tate stated, under oath, that appellant often had diarrhea and vomited on herself, and had to be cleaned up. Tate also said appellant did not have use of her hands and had Parkinson symptoms from one of her medications. Tate represented that appellant was attacked by a coworker in 2002, following which she was diagnosed with "dominant disturbance of emotions" and placed on antipsychotic medication. When asked by the administrative law judge (ALJ) for more detailed medical documents about the attack, Tate represented that "[t]he attorney" said appellant

was not entitled to copies of the psychiatric evaluation. Because appellant was unable to maintain a steady hand, according to Tate, appellant could not feed herself. Tate further represented that appellant had to be bathed and changed like "a newborn baby." Tate represented that appellant was not bedridden unless she had a seizure, but she had a debilitating seizure about three times a week. Tate further represented appellant could not walk long distances and sometimes could not move, on which occasions she was put in a wheelchair; in addition, she was up one hour and then rested an hour per doctor's orders, and did not have use of her hands to brace herself in getting up and down. Tate also represented that a doctor had told appellant to wear her wrist braces 24 hours a day.

As a result of the fair hearing decision, appellant's IHSS hours were increased to 181.4 per month. In addition, Jhaveri performed a protective supervision assessment of appellant on August 5, 2005.[5] The first time she went to appellant's home, appellant was asleep, so Jhaveri spoke with Scott. Scott related that appellant needed a wheelchair to get around inside the house. That did not qualify appellant for protective supervision. Later that day, Jhaveri returned at appellant's request. Scott was again present. Appellant was now sitting in a wheelchair, holding her arms like she was trying to protect herself from something, and barking like a dog. She said people were trying to hurt her. Scott related that appellant would sometimes go to the windows and doors at night and use her flashlight to see if somebody was there, because she was afraid someone was trying to hurt her. Sometimes, appellant would go outside with the flashlight. These statements were inconsistent with Scott's previous representations that appellant was wheelchair bound and needed assistance even in the wheelchair. Jhaveri did not approve the request for protective supervision.

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[5] Protective supervision is available to someone who, as a result of mental impairment or mental impairment combined with physical disability, needs to be supervised 24 hours a day because he or she is unable to maintain his or her own safety.

Records showed appellant was enrolled at Fresno City College during the spring, summer, and fall semesters of 2005. Records further showed that on February 12, 2005, she was assigned to a computer terminal in the computer lab for almost five hours.

For 10 days in September and October 2005, Robert Pole and Rod Spaulding, investigators for the Fresno County District Attorney's Office, conducted surveillance of appellant in conjunction with their investigation of the fraud referral initiated by Rojas. At various times, appellant was seen (and sometimes videotaped) driving her car; unlocking, and getting into and out of, her vehicle without any apparent problems; walking into and out of businesses without any apparent trouble and without any assisting devices such as a cane, walker, or wheelchair; carrying papers in one of her hands; carrying a white plastic bag; pulling a wheeled briefcase or backpack from a parking stall about 100 yards into a classroom at Fresno City College; driving an adult and two children from an apartment complex to and from another location; standing and talking with someone for about five minutes and then giving another person a hug; and pulling open a gate and driving her car from her driveway into her backyard.[6] Sometimes she wore her wrist braces and sometimes she did not.

Spaulding showed Jhaveri the video on October 5, 2005. In looking at it, Jhaveri could see appellant did not qualify for IHSS, because she was able to get around by herself. Appellant's eligibility for IHSS was subsequently terminated.[7] Nurse practitioner Nellie Go, who wrote two letters authorizing services she thought appellant needed, based on the symptoms appellant said she was experiencing, also viewed the

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[6] The recording of those portions of the surveillance that were videotaped was shown to the jury.

[7] Although appellant's IHSS eligibility continued into 2006, she and/or her providers were not paid for IHSS hours after August 31, 2005, because no timesheets were submitted for services provided beyond that date. However, there was a history in this case of submitting a group of timesheets at the same time.

video. It changed her opinion and led her to conclude appellant was able to perform her own daily activities. The depiction of appellant on the video was very different from how appellant presented herself in Go's office.[8]

On November 30, 2005, Spaulding initiated a vehicle stop on appellant after she drove away from her house, and arrested her pursuant to a warrant. Appellant undid her seatbelt, got out of her car without assistance, walked to the rear of the car, and was placed in handcuffs. She did not appear to have any problems. Her wrist guards were on top of her purse, inside of which were just over $11,000 in cash and 15 uncashed IHSS checks, but no medication. Once at the jail, appellant walked much slower than she had at the time of her arrest, and at one point, she lay down on a bench in the booking area. When Spaulding attempted to have her photograph taken, she said she could not stand up.

Appellant's home was searched following her arrest. No wheelchair was found. Although there was a walker, it appeared to be brand new. At no time during the surveillance was appellant seen using a wheelchair, walker, or cane.

II

DEFENSE EVIDENCE

Madhava Narala, M.D., first saw appellant as a patient on May 3, 2005. Her main problems were chronic neck pain, back pain, carpal tunnel syndrome, uncontrolled seizures, and chronic depression. X-rays of appellant's neck and back were consistent with her complaints of pain, and Narala had a 2003 report from a previous doctor diagnosing carpal tunnel. Narala treated appellant for asthma, thyrotoxicosis, sleep apnea, schizophrenia, and epilepsy. In May 2005, he prescribed Ativan, Haldol, Lortab,

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[8] Appellant herself prepared one of the documents for Go's signature. Go browsed through it, but, being busy with patients at the time, signed it without confirming appellant made all the corrections Go directed her to make. Appellant was very insistent that Go sign the document, which was prepared shortly before a fair hearing.

Lotrel, phenobarbital, Dilantin, Pravachol, and Dyazide to treat those ailments. On September 29, 2005, Narala signed a letter for IHSS, verifying that appellant was his patient; stating her diagnoses, the medications she was on, and how she was disabled; and prescribing protective services. The letter was brought to him by appellant and her daughter, and he reviewed it. The diagnoses listed were in fact his diagnoses. Since the list of services that should be provided by IHSS looked appropriate based on what appellant and her daughter told him, he signed it.

Narala — who admitted always believing what a patient said — was shown a portion of the surveillance video, but saw nothing that was inconsistent with his diagnosis of appellant. Whenever she came into his office, she came with her daughter and walked slowly. It is common for someone with appellant's diagnoses to have good days and bad days.

DISCUSSION

I

PROSECUTORIAL MISCONDUCT

Appellant contends the prosecutor committed misconduct by arguing to the jury that appellant and Katherine Tate were the same person, when he knew or should have known that was not true. We find no cause for reversal.

A. Background

The August 17, 2004, and December 22, 2004, fair hearings were held telephonically. Each time, appellant was present, but designated Katherine Tate to act as her authorized representative.[9] As a result, although appellant minimally participated in each hearing, Tate presented and argued appellant's position to the ALJ, questioned

[9] At the first fair hearing, Tate stated she was an independent paralegal and a sister in the church to which appellant belonged, and had assisted with some of appellant's in-home needs.

witnesses, and testified herself concerning appellant's physical and mental condition and her need for services. Audio recordings of the hearings ultimately were played for the jury.

The issue of whether Tate truly was present at the hearings first arose during a preliminary discussion of evidentiary issues that needed to be addressed in limine. The prosecutor stated that if appellant testified, he might ask the court to admit the fact she was declared a vexatious litigant in 2005, for the purpose of showing her ability to manipulate the courts and fair hearings. The prosecutor said it was the People's theory that, during the fair hearings, appellant used her own voice to represent to the ALJ that Katherine Tate was speaking. During the actual hearing on in limine motions, the prosecutor reiterated the People's theory that, on the audiotapes of the fair hearings, Tate was actually appellant speaking with a heavy Jamaican accent. The trial court sustained defense counsel's objection to Spaulding being allowed to testify that he believed Tate to be a fictitious person, finding such testimony speculative absent further foundation.

During the testimony of Michael DeLeon, a social services appeals specialist with the County of Fresno, the prosecutor elicited that it was the IHSS claimant who indicated, when requesting a fair hearing, whether the hearing was to be held telephonically. The prosecutor further elicited that if the claimant designated somebody to act as his or her authorized representative, no identifying information was required other than the name of the designee and the claimant's signature on the form used to request the fair hearing. When the prosecutor asked if that meant that, in a telephonic hearing, there was no real way to ask the authorized representative for verification of identity, defense counsel objected on relevance grounds. After a sidebar conference, the objection was overruled; however, the question was not answered and the prosecutor moved to a different subject.

During the next recess, the following took place:

> "MS. GIRARD [defense counsel]: … I wanted to place on the record that I did object to the line of questioning of Mr. DeLeon and I

actually objected to his testimony as being irrelevant to this case and that the questioning that Mr. Corona [the prosecutor] was asking, I believe, was attempting to paint a picture that [K]atherine Tate does not exist. So I wanted that objection noted for the record, although it was overruled. [¶] … [¶]

"THE COURT: Okay. I did overrule your objection and I find that the questioning of Mr. DeLeon does provide a substantive foundation for the process of a fair hearing process [*sic*]….

"Now, with regard to the suggestive aspects of what you believed Mr. Corona was actually trying to do, he never asked any such questions. I ruled at sidebar that he was not to elicit such an opinion, and after determining that this particular witness wasn't possessing personal knowledge to even venture a guess on the issue, but we did also discuss at sidebar that people can advance a theory to the jury that this person, Ms. Tate, who was identified as such in the two tapes we've heard, that she does [not] exist.[**10**]

"Now, we talked about admissible ways of going about that and not, and I suppose that we are going to have further hearings on this issue, but my ruling was that as far as having this witness offer any type of opinion on that what you objected to as suggestive questioning, I did essentially sustain your objection in that regard and told Mr. Corona that that wasn't going to come in through this witness…."

During his opening argument, the prosecutor told jurors to focus on the issue of whether the statements made by appellant and/or her authorized representatives or coconspirators, to the social workers and at the hearings, were true or false. He argued that appellant, her daughters and mother, and "the individual calling herself Katherine Tate" were participants in an uncharged conspiracy to defraud the government. In part, he pointed to the differences between what Rojas found in his face-to-face assessment of appellant and the statements Tate and others made about appellant's condition in the telephonic hearings. A short time later, he stated:

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10 The reporter's transcript reads, "that she does exist." We concur with the parties that the trial court misspoke.

"Now, let's go to Katherine Tate now. The state of the evidence regarding Katherine Tate is she was never seen at the fair hearing. At the first fair hearing she was never seen. She was heard on the telephone. How about the second fair hearing? She was never seen there personally, only on the telephone. Was she seen at this trial? She's a logical witness. Where is she? The evidence is that this is — this person, this Katherine Tate, this independent paralegal, sister of the church, she wasn't here. Why not? Because the evidence shows it's very likely, Katherine Tate and Janetta Sconiers are one in [*sic*] the same person. Listen to — listen to the transcript — or to the tape. Look at the transcript. Katherine Tate and Janetta Sconiers never speak at the same time. They're always never in person. Katherine Tate speaks in the first tense a couple of times. She kind of gets her persons mixed up sometimes. For instance, she said, 'I spoke to Minaxi [Jhaveri].' She didn't speak to Minaxi. Minaxi said she never spoke to Tate. Tate wasn't there. She just kind of tripped up a little bit and she forgot, oh, wait a minute, Ms. Tate, Ms. Sconiers, same person. That definitely undermines credibility. That's circumstantial evidence.

"Remember that the issue in this case is not whether certain medical conditions existed. The issue is that the defendant made false statements about her abilities in order to convince others to authorize her services…."

In her argument, defense counsel responded:

"Ladies and gentlemen, this case is overwhelmed with reasonable doubt.…

"First of all, the conspiracy theory. There's a conspiracy between Ms. Sconiers, her two daughters, her mom, and Ms. Tate. Oh, and don't forget Ms. Tate doesn't exist; right? That's the — that's the People's theory. There's been no evidence to contradict or no evidence to support that she exists. Why isn't she here? Why wouldn't she be a witness? Well, I'll tell you why. Because I don't have to present any evidence to you. We talked about that at the very beginning.… He's got to prove this case to you, each and every element of each crime. He's got to prove it to you. I don't have to prove it didn't happen. He's got to prove that it did. So the fact that she did not testify in this trial is completely irrelevant. These facts happened in 2004 and 2005 and it's 2010, okay. If she testified or didn't testify, it is irrelevant. And there's no evidence that suggests that she doesn't exist. There's no evidence to support that just because the social workers that testified never saw her. You've got to have more than that. You've got to have facts beyond a reasonable doubt. And just because you say a lot of stuff doesn't mean you have all the puzzle pieces."

After appellant was convicted, new defense counsel moved for a new trial on the ground that the prosecutor improperly commented on appellant's failure to testify (and so committed federal constitutional error under *Griffin v. California* (1965) 380 U.S. 609, 613, 615) by arguing appellant failed to call Tate as a witness and then asserting Tate and appellant were one and the same. Appended to the motion was a letter purporting to be from Ralston L. Courtney, a local attorney. The letter, dated December 3, 2005, was addressed to Deputy District Attorney David Jones, and stated it was a memorialization of their conversations. In part, the letter said Courtney had been retained to represent appellant during the IHSS hearings, and that Tate was a real person whom Courtney employed to prepare documents for the doctor's review and signature, appear for Courtney, and advise the hearing officer concerning appellant's disabling conditions. Courtney offered to make Tate available to Jones or Jones's designee, if Jones could guarantee she would not be arrested.

Also appended to the new trial motion was a document titled "ADDENDUM TO RALSTON L. COURTNEYS' [*sic*] LETTER DATED JUNE 11, 2010." In it, Courtney wondered why no one ever got back to him regarding what Courtney had said about "our witness" Katherine Tate. Courtney asserted that he told appellant he had conflicts because of the attorney-client relationship with her, and that he could not represent her daughter during the proceedings. On December 2, 2009, he gave Jones this information, and also shared with him conversations Courtney had with Tate. Courtney represented that he told Jones he had known appellant since about 1995, and that she was not faking her illness and was in need of in-home services. The "Claimant Position Statement" dated January 20, 2005, and "Declaration of Rosie Sconiers" (appellant's mother) dated November 9, 2005, stating what services were needed, were prepared by Tate according to Courtney's direction. Upon learning from the State Bar Journal that Jones had been disbarred or at least suspended, Courtney surmised that Jones had not passed on to others handling the case the information provided by Courtney, which may have been the reason the current

prosecutor made the "outlandish" statement to the jury that Tate did not exist, and that she and appellant were the same person.[11]

B. Analysis

"When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury. [Citation.] 'To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his [or her] objection, and ask the trial court to admonish the jury.' [Citation.] There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct." (*People v. Panah* (2005) 35 Cal.4th 395, 462; accord, *People v. Hill* (1998) 17 Cal.4th 800, 819.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord, *People v. Clair* (1992) 2 Cal.4th 629, 663.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most

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11 The referenced letter of June 11, 2010, was appended to the probation officer's report. It represented that at some point, Courtney spoke to Tate and told her that she could be called as a witness or even charged with a criminal offense in this matter, and that he had not seen or heard from her since. He understood she absented herself from the area to prevent possible arrest. The letter reiterated that Courtney personally knew not to be a fact that Tate did not exist and that she and appellant were one and the same.

damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye, supra,* 18 Cal.4th at p. 970.) Moreover, we keep in mind that "the prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine. [Citations.] The prosecutor may not, however, argue facts or inferences not based on the evidence presented. [Citation.]" (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) A showing of bad faith is not required to establish prosecutorial misconduct. (*People v. Hoyos* (2007) 41 Cal.4th 872, 924, fn. 36, overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643.)

Any objection to the prosecutor's quoted remarks here almost certainly would have been futile, since the trial court had already ruled the prosecutor could make such an argument. Thus, the issue was preserved for appeal despite defense counsel's failure to object.[12]

Since the prosecutor argued in accordance with the court's ruling, there was no misconduct. (Cf. *People v. Hawthorne* (2009) 46 Cal.4th 67, 94, overruled on another ground in *People v. McKinnon, supra,* 52 Cal.4th at pp. 637-643; *People v. Harris* (2005) 37 Cal.4th 310, 345.) Even assuming we impute knowledge of the 2005 letter to the trial prosecutor (see *In re Brown* (1998) 17 Cal.4th 873, 879 [for federal constitutional disclosure requirement of *Brady v. Maryland* (1963) 373 U.S. 83, prosecutor's office constitutes single entity]), that letter — the only one dated before closing argument in this case — sheds no light on whether Katherine Tate actually appeared at the fair hearings. The prosecutor's argument that appellant was pretending to be Tate at those hearings was

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12 Accordingly, we do not address appellant's claim that any forfeiture was the result of ineffective assistance of counsel.

supported by inferences that reasonably could be drawn from the evidence, particularly that Tate and appellant never spoke at the same time; Tate wanted the first fair hearing decision sent to her in care of appellant's address, instead of to her own address as would usually be done when the claimant had an authorized representative; Tate had intimate knowledge of what transpired during Rojas's assessment of appellant, which she claimed came from listening on a speaker phone, without Rojas's knowledge, to the entire assessment; and, at the second fair hearing, Tate spoke in the first person ("I") of telling things to Jhaveri, yet Jhaveri testified she had never met Tate or talked with her in person or by telephone.

Appellant says, however, that the existence of the 2005 letter shows the prosecutor did indeed commit misconduct by arguing Tate and appellant were not separate people. "[A] prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process …. [Citations.]" (*People v. Sakarias* (2000) 22 Cal.4th 596, 633, & cases cited therein.) "It is certainly within the bounds of fair advocacy for a prosecutor … to ask the jury to draw inferences from the evidence that the prosecutor believes in good faith might be true. But it is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt …." (*United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968.) Based on the 2005 letter, appellant says, the prosecutor had strong reason to doubt his theory that appellant and Tate were one and the same person.

Considering the prosecutor's argument as a whole, we do not think it reasonably likely jurors interpreted the challenged remarks as suggesting Tate was a nonexistent person. Rather, the import of the argument was that appellant impersonated Tate at the fair hearings and, as a result, did not call Tate at trial despite the fact she was a logical witness. If the implication was as appellant claims, however, we disagree that the prosecutor committed misconduct. The People's case was rife with examples of appellant's ability to manipulate both individuals and the system to her advantage. Under

the circumstances, the prosecutor was not required to accept the genuineness of the letter, and we cannot conclude he knew or had strong reason to know the inference he propounded to the jury was false.

Finally, and despite appellant's vehement assertions to the contrary, the evidence against her was overwhelming. If misconduct occurred, it was manifestly harmless.

II

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant says her trial attorney rendered ineffective assistance of counsel. Had defense counsel sufficiently investigated the issue, appellant contends, she would have discovered evidence and witnesses that could have disproved the prosecutor's claim appellant and Tate were the same person. Even if counsel could not have located and/or produced Tate, the argument runs, it should have been easy to find and interview Courtney, and thus obtain strong evidence to rebut the prosecutor's theory.[13]

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25

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[13] We believe the record as a whole shows the prosecutor's theory to have been that appellant pretended to be Tate at the fair hearings, not that Tate did not exist at all. We will assume for purpose of our analysis, however, that appellant's broader interpretation is correct.

Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.) A defendant must establish inadequate performance by a preponderance of the evidence. (*In re Thomas* (2006) 37 Cal.4th 1249, 1257.)

A defense attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Strickland v. Washington, supra,* 466 U.S. at p. 691.) Thus, a defendant in a criminal trial " 'can reasonably expect that in the course of representation [her] counsel will undertake only those actions that a reasonably competent attorney would undertake. But [s]he can also reasonably expect that before counsel undertakes to act at all [s]he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. [Citations.] If counsel fails to make such a decision, [her] action—no matter how unobjectionable in the abstract—is professionally deficient.' [Citation.]" (*In re Gay* (1998) 19 Cal.4th 771, 807.)

"[A] defense attorney who fails to investigate potentially exculpatory evidence … renders deficient representation. [Citations.]" (*In re Edward S.* (2009) 173 Cal.App.4th 387, 407.) Relying on the client for sources of such evidence is not always a reasonable or informed decision. (See *In re Gay, supra,* 19 Cal.4th at pp. 807-808.) To establish ineffectiveness of counsel, however, a defendant "must *prove* that counsel failed to make particular investigations …. [Citation.]" (*In re Sixto* (1989) 48 Cal.3d 1247, 1257, italics added.) A defendant who claims ineffective assistance of counsel on appeal "must establish deficient performance based upon the four corners of the record." (*People v. Cunningham, supra,* 25 Cal.4th at p. 1003.) "If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 367.) In other words, "in assessing a Sixth Amendment attack on trial counsel's adequacy mounted on *direct appeal*, competency is *presumed* unless the record

affirmatively excludes a rational basis for the trial attorney's choice. [Citations.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.)

In the present case, there was some suggestion at sentencing that the 2005 letter was never made known to appellant's trial attorney. During the discussion prior to the hearing on in limine motions, however, counsel for Scott (who was still a codefendant at that point) mentioned that Scott's prior attorney made some statements to the district attorney's lead investigator, and so Scott would be moving to exclude all of those. The prosecutor responded that he did not intend to try to introduce any of that evidence, as he did not believe it was admissible. The next day, the trial court formally excluded "any testimony from attorney Ralston Courtney."

This is the extent of the record that is even arguably pertinent to appellant's claim of ineffective assistance. We have no way of knowing what investigative efforts trial counsel did or did not undertake. "As evidence of incompetency of counsel, the failure of the record to reflect … indicia of investigative effort has no … probative value …. It establishes neither an actual failure to investigate nor a basis for concluding that evidence [contradicting the prosecution theory regarding Tate] was available and was not offered as a result of counsel's failure to discover it. A factual basis, not speculation, must be established before reversal of a judgment may be had on grounds of ineffective assistance of counsel. [Citations.]" (*People v. Williams* (1988) 44 Cal.3d 883, 933.)

The record on appeal sheds no light on what actions trial counsel took or failed to take or why. Nor does it preclude the possibility of a satisfactory explanation for counsel's conduct. (See *People v. Jimenez* (1992) 8 Cal.App.4th 391, 397-398.) Accordingly, appellant's claim must be rejected on appeal. (*People v. Jones* (2003) 30 Cal.4th 1084, 1115; *People v. Hinds* (2003) 108 Cal.App.4th 897, 902.)[14]

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14 In light of our conclusion, we deny appellant's request for judicial notice of certain records of the State Bar of California pertaining to Ralston L. Courtney. The ease with

DISPOSITION

The judgment is affirmed. The "Request for Judicial Notice of State Bar Records," filed May 9, 2011, is denied.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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GOMES, J.

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which trial counsel could have located Courtney and secured his purported evidence for trial is irrelevant, since the record on appeal fails to establish trial counsel did *not* locate and contact him. (See *People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6.)